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In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN,
et al.
Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.
Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

REPLY, AND ADDITIONAL APPENDIX, AS TO BRIEFS OPPOSING PETITION FOR WRIT OF CERTIORARI

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REPLY AS TO QUESTION PRESENTED

Focusing on Congressional intent, Wisconsin framed the "Question Presented." Petition, p. i; S.Ct.Rule 14.1(a). Diverting attention from Congressional intent, the Engineers and USDOL each propound an alternative Question. To avoid analyzing the disciplinary deduction standard, part of the salary basis test, they each call that test a "regulation" promulgated under legislative rule-making authority. The test is not a regulation (App. 66-69, 75-76, 118-120; USDOL brief, p. 15, n.15) and does not merit the deference granted by the court of appeals and requested by the respondents.

The Engineers claim USDOL scrutinized the rationale of the test repeatedly and recently. USDOL has not, for forty years, examined if the test is rational. App. 83-84, 90, 95-96, 99, 102-103, 111. USDOL has, for the past ten years, consigned to an "overall review" all questions about the rationality of its FLSA exemption criteria, has expressly refused, in adopting 29 C.F.R. § 541.5d, to contemplate if the test makes any sense and continues to postpone deadlines for thinking about rationality. *Id.*; App. 85-86, 120-145.

Even if the test were rational, the appellate court should be reversed if USDOL has no rationale for the disciplinary deduction standard or for applying it to public employers. A 1949 report said disciplinary deductions should be barred. Petition, pp. 7-8 and 9-10, n.1; App. 72-73, 110-111 and 112-115. USDOL, publishing the salary basis test later in 1949, barred no disciplinary deductions. App. 118-120. Its first proposal for a standard in the test, in 1954, allowed suspensions for "major disciplinary reasons." App. 72-73. Citing unspecified "comments", the final version allowed only safety-related suspensions. App. 73. USDOL never published a rationale for the standard much less enunciated any reason to apply it to the modern

workplace or public sector. Petition, pp. 7-8 and 9-10, n.1; App. 72-73, 85-86, 110-111, 112-115, 118-120, 121-145.

Absent USDOL rationale, the court of appeals conjured a possible reason for the standard, that imposing full day suspensions except in full workweek increments somehow implies an hourly status, but acknowledged even that reason was "pretty feeble." App. 7-8. States, sovereign entities when the Constitution was formed, are forced to choose between unconstitutional options not because Congress intended that result but due to gross federal agency neglect compounded by appellate court abdication. The Garcia hypothesis that State powers would be protected by political processes, tested through party and ideological changes in the Presidency and Congress, ignored these variables and been proven wrong.

REPLY AS TO LIST OF PARTIES

Wisconsin agrees that Ronald J. Strak, not Richard E. Stark, is among the unnamed plaintiffs. Engineers' brief, p. ii; App. 45.

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REPLY AS TO STATEMENT OF THE CASE

A. Assertions by Wisconsin.

Respondents challenge Wisconsin labelling, as "undisputed", findings the district court included in "UNDISPUTED FACTS." App. 14-18. They claim the district court's findings contained legal conclusions.

1. Consequences of differentiating discipline based on exempt status.

The Engineers want this Court to believe there are disputes about whether Wisconsin

> Differentiating discipline between employes because they are exempt and nonexempt would undermine the validity of the discipline, violate Wisconsin's labor relations laws, create dissension and morale problems among its work force and violate its employees' state and federal constitutional rights.

Engineers brief, p. 2, n.1 quoting Petition, pp. 3-4. The district court found this was among the "UNDISPUTED FACTS." App. 16. If certiorari is granted, the record will show (a) Wisconsin proposed detailed facts underlying this finding through the district court's summary judgment procedures,[1] (b) Respondents conceded the facts underlying this finding and (c) undisputed record evidence supported the finding. Dkt. No. 129 (Wisconsin PFOF 55-59 citing Dkt. No. 185 (Litscher aff., ¶¶ 9-17)). The court of appeals did not "reverse" the finding that differentiating discipline based on exempt status would have the consequences noted. It instead

> recognize[d] that a higher percentage of public rather than private employees have tenure and that it is difficult (quite apart from the rather silly constitutional bar to firing a tenured public employee without giving him due process of law) to fire a

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[1]The appellate court approves these procedures. Tatalovich v. City of Superior, 904 F.2d 1135, 1137 (7th Cir. 1990).

public employee; and this makes alternative sanctions more important.

App. 7. The court of appeals reversed because it perceived no "crippling blow to effective public administration" in the consequences which indisputably result from differentiating discipline practices based on exempt status and because it thought only a cursory glance at the disciplinary deduction standard was warranted. App. 6-8.

The Engineers are so intent on avoiding this undisputed finding on consequences, they cite a factual document not in the record, an E-Mail message sent within a defendant agency after the appellate mandate (Resp. App. 7a), to argue Wisconsin believes no impacts result from differentiating discipline based on exempt status. Engineer brief, p. 20. More than one agency is involved. Since July 1995, **all** Wisconsin agencies have been directed, pending resolution here, to avoid suspending exempt employes contrary to the standard.

The evidence actually demonstrates the untenable choices the court of appeals required Wisconsin to make. If Wisconsin had stayed silent about whether it would allow its exempt employes to be suspended contrary to the standard, it would have left itself exposed to immense FLSA liability. Klein v. Rush-Presbyterian-St. Luke's, 990 F.2d 279, 286 (7th Cir. 1993) (to lose exempt status "it is enough that a deduction could have been made for an impermissible reason"); Bankston v. State of Illinois, 60 F.3d 1249, 1253 (7th Cir. 1995) (no actual deduction needed since "it is enough that one could have been made"). Wisconsin officials entrusted with tax revenues collected from its citizens, hoping this Court would both accept certiorari and reverse the court of appeals, could have gambled with guaranteed loss of exemptions for tens of thousands of Wisconsin employes and with high risks of doubling back pay and substantially enlarging liability periods as to any exempt Wisconsin employes who might

make claims. 29 U.S.C. §§ 216(b) and 260. Choosing that course, it would be hard to argue against liquidated damages and findings of wilful violation. *Id.* That gamble would have been unwise for any government required to account to its citizens.

Though Wisconsin was wise to direct its agencies, pending resolution here, to discipline employes differently based on exempt status, that does not diminish the serious consequences of making those distinctions. App. 16. Instead the court of appeals decision forced Wisconsin -- to avoid paying overtime compensation to its tens of thousands of executive, professional and administrative employes and to minimize the massive amount of Wisconsin tax revenues FLSA damages may absorb -- to "undermine the validity" of "discipline" imposed on various employes, "violate Wisconsin's labor relations laws, create dissension and morale problems among its work force and violate its employees' state and federal constitutional rights." App. 16.

If individual employes prevail in challenging these disparities, because exempt status has no rational connection to disparities in discipline, Wisconsin citizens will likely hold Wisconsin, not the federal government, accountable for those adverse results. Wisconsin must inflict substantial harm on its citizens no matter which choice it makes. With either choice, its ability to account to its own citizens is substantially diminished. Faced with untenable choices which should not have been imposed, Wisconsin chose a temporary solution which, it hopes, creates the least net harm to its citizens.

2. **Scope of "undisputed" facts.**

USDOL claims Wisconsin labelled district court findings on congressional intent at App. 26-39 "undisputed." Wisconsin instead labelled as "undisputed" only those findings reproduced at App. 14-18. Petition,

p. 3. Just as Wisconsin did not concede the validity of appellate court findings it reported (Petition, p. 5), Wisconsin did not intend to assert the findings on congressional intent reproduced at App. 26-39 were accepted by all parties (Petition, pp. 4-5).

3. Congressional intent.

USDOL says that when district courts determine if its interpretations, such as the salary basis test, comport with congressional intent (App. 26-39) the courts make legal conclusions rather than factual findings. District court analyses of interpretations in 29 C.F.R. Part 541, Subpart B, being "fact-based", can be not only properly characterized as findings but actually entitled to deference. *E.g.*, Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1072 (1st Cir. 1995) cited by USDOL for other holdings (USDOL brief, p. 15, n.15); Martin v. Cooper Electric Supply Co., 940 F.2d 896, 900 (3rd Cir. 1991); Dalheim v. KDFW-TV, 918 F.2d 1220, 1225-26 (5th Cir. 1990). The court of appeals here, rather than deferring to district court findings on whether the USDOL interpretations comported with Congressional intent, deferred to the USDOL interpretations. App. 5-8.

B. Additional assertions by respondents.

The Engineers and USDOL erroneously characterize additional assertions as facts. A few examples are noted.

1. Claim that decision not based on possible suspensions.

The Engineers claim the appellate decision was grounded on actual suspensions rather than on contingent possibilities that suspensions contrary to the disciplinary

deduction standard could be received. Engineers brief, pp. 2 and 3, n.2. They claim multiple suspensions contrary to the standard were actually imposed on various members of the plaintiff class. *Id.* This is untrue. During the liability period, one plaintiff, David Russell, was suspended by his employer agency contrary to the standard. Petition, p. 4 citing App. 16 and 31. A potential suspension of another employe, Terry Cook, depended on the outcome of a grievance proceeding. App. 16 and 31. If loss of exemption turned on a plaintiff actually receiving a suspension contrary to the standard, rather than a contingent possibility that the plaintiff would receive such a suspension (App. 2), the appellate court would have affirmed summary judgment either against all plaintiffs other than David Russell or against all plaintiffs not employed by Russell's employer agency. Instead it found exemptions were lost as to all plaintiffs and reversed summary judgment as to all plaintiffs and all defendant agencies. App. 5-8.

The court of appeals below denies exempt status if an employe "**could** have been" suspended contrary to the standard even if no contrary suspension actually occurs and even if such suspensions are merely possible. *E.g.*, Klein, 990 F.2d at 286; Bankston, 60 F.3d at 1253; emphasis added. *See* App. 2; USDOL brief, p. 3-4. The courts of appeal interpret this question in widely varying ways. Some interpret 29 C.F.R. § 541.118(5) to bar exempt status only if an actual policy **expressly** calls for contrary suspensions and not if such suspensions are merely a "contingent possibility." Auer v. Robbins, 65 F.3d 702, 710 (8th Cir. 1995), *petition for cert. pending*, No. 95-897; Barner v. City of Novato, 17 F.3d 1256, 1262 (9th Cir. 1994) (restricting prior holdings in Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991)); Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 615 (2nd Cir. 1991), *cert. denied*, 113 S.Ct. 298 (1992); York v. City of Wichita Falls, 944 F.2d 236, 242 (5th Cir. 1991). Other courts interpret 29 C.F.R.

§ 541.118(5) as barring exempt status only if an actual suspension is received even though a policy expressly calls for contrary suspensions. *E.g.*, Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta, 920 F.2d 800, 805 (11th Cir. 1991).

The Seventh Circuit may stand alone in its draconian view of 29 C.F.R. § 541.118(5) which deprives employers of FLSA exemptions on a wholesale basis unless the option of suspending exempt employes contrary to the standard is completely surrendered. *E.g.*, Klein, 990 F.2d at 286; Bankston, 60 F.3d at 1253. Though State sovereignty is sacrificed under all of these appellate views, in the Seventh Circuit, the sacrifice is more transparent and egregious. State employers within the Seventh Circuit must do more than refrain from actual suspensions, and from adopting express policies allowing suspensions, contrary to the USDOL standard. They must declare formal unilateral surrender to USDOL, as Wisconsin has now done pending resolution here, by expressly stating obedience to all USDOL commands on disciplining FLSA-exempt employes no matter how disruptive to public accountability. *Id.* USDOL recognizes how dramatically divergent the circuits are in their interpretations of this USDOL "interpretation" App. 88-89, 97-98, 138-139 and 140. It refuses to clarify its scope. App. 120-145.

2. Claim that district court, without support, invalidated federal law rather than construe Congressional intent.

The Engineers state that the district court, without citation, "invalidate[d] federal **law** to accommodate . . . Wisconsin's disciplinary policies and practices." Engineers brief, p. 3; emphasis added. While the Engineers may disagree with how the district court construed

Congressional intent to assure federal law was implemented, no federal law was invalidated. App. 18-39. In contrast to the court of appeals analyses (App. 5-8), the district court analyses were not only littered with citations but demonstrate cogent and careful consideration of the cited authorities and the applicable legal principles. App. 18-39. Contending the district court's conclusions were unsupported by any citations, though puzzling, should not require further consideration. Finally, what is involved is not accommodation but whether Congress, acting only under its Commerce power, intended, or could have intended, to prohibit States from imposing otherwise proper discipline on its own employes.

3. Claim that Congress intended its 1985 amendments to be the only allowed variance in FLSA enforcement between the public and private sectors.

The Engineers lost, at both lower court levels, their claim that Congress allowed for no distinctions in how exemptions apply in the public and private sectors (App. 5-6, 22-26) and sought no review. Opposing Wisconsin's Petition, they resurrect the same arguments rejected by both lower courts. They assert the very limited accommodations Congress was asked to, and did, provide to the public sector in 1985 -- which had nothing to do with exemptions or any "salary" issues -- marked the boundaries of any differences Congress intended to exist between the public and private sectors. Engineers brief, pp. 4-5, Resp. App. 8a-9a. This is untrue. USDOL, in creating the very differences in exemption criteria the Engineers challenged, found the 1985 amendments only addressed "particular concerns," did not "affect" or "address" applying the exemptions to public employers and that "[n]either the statutory changes nor the

legislative history of the 1985 Amendments contain any significant references" to the exemptions or any USDOL pronouncement on the exemptions. App. 93-94. *See also* USDOL brief, pp. 19-20, n. 19. Congress intended exemption criteria to be different. App. 5-6, 22-26.

4. Claim that USDOL fully reconsidered the rationale of the salary basis test and the disciplinary deduction standard in its 1992 rulemaking.

The Engineers, to bolster their claim that USDOL fully reconsidered the rationale of the salary basis test in the 1992 rulemaking, cite the 1985 "advance notice of proposed rulemaking requesting the views of the public on **any changes they felt were necessary in 29 C.F.R. Part 541.** App. 83-84." Engineers brief, p. 7, highlighting in original. They then recite selected USDOL actions thereafter, with carefully edited quotes, leaving the impression USDOL had, during its 1992 rulemaking and otherwise, "taken many opportunities to reexamine the salary basis test." Engineers' brief, p. 10.

USDOL, as rulemaker, has declared repeatedly that it has **declined** many opportunities to reexamine the salary basis test. After USDOL, in 1985, allowed for comments on the rationality and workability of 29 C.F.R. Part 541 (App. 83-84), it has declared consideration of these issues completely off-limits in any other context (App. 84-85, 85-86, 90, 95-96, 99, 102-103, 111). This "overall review", which precludes any rethinking of underlying rationality or irrationality of any part of 29 C.F.R. Part 541 outside the "overall review" (App. 90, 99, 102-103, 111) keeps being deferred into the indefinite future (App. 121-145). Adopting 29 C.F.R. § 541.5d, USDOL expressly refused to think about rationality:

> A number of comments were submitted that focused on issues . . . on which [USDOL] had not proposed changes or invited public comment, which [USDOL] will not be addressing at this time. However, to the extent appropriate, [USDOL] will consider these views in . . . its overall review . . . .

App. 102-103. The Engineers quote statements USDOL made about the standard during this 1992 rulemaking only because some commentators were so impertinent as to ignore USDOL's self-imposed constraints. Engineers brief, p. 10. The Engineers omit the language immediately following these quoted statements:

> Section 541.118(a)(5) was **not** open for comment during the present rulemaking. However, [USDOL] expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date.

App. 111; emphasis added. Admitting their entire exemption structure is "sorely out of date" and fraught with "confusion" (App. 138-139 and 140), USDOL has continued to set no deadlines, or defer deadlines, for probing the rationality or irrationality of the salary basis test and its components. App. 85-86, 121-145.

USDOL claims, as an advocate, it "modified" the salary basis test for public employers based on regulatory review and enforcement experience, rather than a recognition it had misconstrued Congressional intent for decades, and that it "retained" the disciplinary deduction standard as part of a careful reconsideration. USDOL brief, pp. 4-7. It did neither. The best response to this astonishing claim is USDOL's own contrary statements as a rulemaker. App. 110-111, 121-145. If this reflects a

USDOL view that it need do no more in examining rationality, the situation is even more grave.[2]

5. Claim that Wisconsin is disingenuous in asserting non-safety suspensions except in full workweek increments are prohibited.

The Engineers accuse Wisconsin of being "disingenuous" in noting the disciplinary deduction standard prohibits all suspensions not based on major safety rule violations except in full workweek increments -- prohibiting, for example, workers with five-day workweeks from being suspended for 12 days, 21 days or any other period not divisible by five. USDOL, in its brief, also characterizes its prohibition as precluding only non-safety suspensions of less than one full workweek.

The standard precludes precisely what Wisconsin asserted. Assume a public worker is observed stealing public property on a Wednesday and admits the theft that day. If an employer imposes a 12 day suspension --

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[2]Kafka's parable comes to mind:

> Before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. "It is possible," says the doorkeeper, "but not at the moment. . . ."

Kafka, "Before the Law", Franz Kafka: The Complete Stories 3-4 (Glatzer ed. 1972). The man remains, receiving sporadic hopes of entry at constantly retreating moments, until, when he dies, the door, having served its purpose, is closed. *Id.*

starting the next two days, Thursday and Friday, and for two weeks thereafter (partially to protect public property from further thefts) -- encompassing those two days violates the standard. Why? Because workweeks in which any work is performed are covered by the standard and the 12 day suspension involves one covered workweek. 29 C.F.R. § 541.118(a).

Under the standard, the public employer either would have to wait until the next Monday to start suspending the employe without pay or immediately suspend the employe -- who had just stolen from the public till -- and pay compensation, out of public funds, to an employe not at work because of theft. By contrast, the original intent of the FLSA was to assure: "'A fair day's pay for a fair day's work.'" Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942)

Wisconsin understands the difficulty the Engineers and USDOL have in squaring this nonsensical result with an "hourly/salaried" distinction. It is not disingenuous, however, to observe the actual results of the standard.

6. Claim that Wisconsin limited challenge to asserting the disciplinary deduction standard should apply only in the public sector.

The Engineers and USDOL say Wisconsin has asserted an otherwise valid disciplinary deduction standard should not apply in the public sector. While Wisconsin, both before the appellate court and in its Petition, directed its analyses primarily to the special circumstances facing the public sector, Wisconsin has challenged the validity of the salary requirement, the salary basis test and the disciplinary deduction test as applied to both the public and private sectors. It also

challenged the draconian loss of exemptions resulting from how the appellate court interprets the standard.

REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

Congress never intended to exercise its commerce power to require States to impose discipline on their employes contrary to public accountability standards.

B. USDOL has not articulated a rationale for its disciplinary deduction standard, an outdated non-regulatory interpretation, or why Congress would apply that standard to public employers.

1. Through rulemaking, USDOL admitted there is no reason to apply the disciplinary deduction standard to public employers.

When 29 C.F.R. § 541.5d was adopted as a regulation in 1992, USDOL articulated no rationale to apply the disciplinary deduction standard to public employers and actually admitted, by implication, there was no rationale. Though USDOL refuses to acknowledge it, the regulation and its accompanying commentary made it clear salary should not be a criterion for exempt status for public employes. App. 59-60, 91-112. Though the connection between payment on a salary basis and the disciplinary deduction standard was already "pretty feeble" (App. 8), applying the standard in the public sector certainly can not be justified after this implied abandonment of a salary requirement in the public sector.

In 1992, USDOL finally recognized it comports with the intent of Congress in 1974 for a public employer to deduct pay for three hours from an eight hour day when an exempt public employe takes off three hours without permission. 29 C.F.R. § 541.5d(a)(1) (App. 59). Yet State and local employers lose all exemptions if they reserve the right to suspend workers for **full** workdays except in full workweek increments. If salary were a proper criterion, reason would suggest exactly the opposite conclusion: deductions for less than full workdays would threaten the exemption while deductions in full workday increments would not.

The truth is that, as with federal employes, pay on an salaried basis is not a proper exemption criterion at all. Petition, pp. 7-8, 10; App. 52-55, 76-82 (salary always consciously omitted as an exemption criterion for federal workers since inconsistent with proper principles of public administration). Though USDOL, as an advocate, argues the decision in Service Employees Int'l Union, Local 102 v. County of San Diego, 60 F.3d 1346, 1353 (9th Cir. 1995), *as amended on denial of rehearing, cert. denied*, No. 95-724 (1/16/95) -- which held that applying salary basis test to public employers "invalid in its entirety" (*id.* at 1353) -- was wrongly reasoned, with this Court having denied a writ of certiorari, it does become the law in the Ninth Circuit. USDOL, as a rulemaker, admitted in 1992 that the initial empirical rationale for a salary requirement, that employers said it was a "universal" way to pay exempt employes, is untrue in the public sector. Petition. p. 6; App. 92. *See also* Petition, p. 14, n.4 (federal government admitting few federal employes paid salary). Yet USDOL asserts the disciplinary deduction standard still applies.

The Engineers argue that USDOL articulated a rationale for imposing its disciplinary deduction standard on public employers. It never has. The court of appeals, on its own, conjured the "only answer" it could, "that if an

employer measures out discipline in the form of fractions of a weekly salary, the implication is that the employee is really being paid on an hourly basis", and characterized even its own reason as "pretty feeble". App. 7-8. The court of appeals failed to realize USDOL admitted Congress never intended to apply the salary requirement in the public sector. It also failed to realize that, even if a salary requirement applied, suspending employes for full workdays has nothing to do with whether the employe is paid on an hourly basis since the employe is being paid for full workdays without regard to the hours involved.

Rationales supporting either the disciplinary deduction standard or applying that standard to public sector employers must be expressly stated through rule-making. *E.g.*, Bowen v. Georgetown University Hospital, 488 U.S. 204, 212-13 (1988); Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co., 463 U.S. 29, 48-49 (1983). Courts decline to accept rationales articulated by appellate counsels for agencies other than rationales during rule-making. *E.g., id.* Rationales articulated by non-agency litigants or lower courts should also be unavailing. Requiring that rationales be expressly stated through rule-making must be strictly adhered to so an agency's purported ""*expertise*, the strength of modern governments, [does not] become a monster which rules with no practical limits on its discretion. [Citations omitted.]"" Motor Vehicle Manufacturers Ass'n, 463 U.S. at 48, italics in original.

USDOL, in a 1949 hearing report, said no discipline should be imposed on any exempt employe for two reasons: administrative convenience and few of the private employers then covered ever disciplined their exempt employes. App. 112-115. USDOL, creating the salary basis test at the end of 1949, included **no** disciplinary deduction standard. App. 118-120. This report containing the only enunciation of any rationale -- though for a disciplinary standard rejected in 1949 and

far different than the one adopted five years later -- should be examined. Even where constitutional issues are not involved, the Court is skeptical of agency rationales based on administrative convenience where the results of the chosen course, as here, are confusing and complex. *E.g.*, Cottage Savings Ass'n v. Commissioner, 499 U.S. 554, 565-66 (1991). A rationale assuming employers rarely discipline their executive, professional or administrative employes under any circumstances is so woefully outdated, if ever correct, the court of appeals did not even mention it in deciding against Wisconsin. App. 7-8. A cursory knowledge of employment law will confirm that, in the public and private sectors, executive, professional and administrative employes are frequently subjected to various types of discipline. The standard. Requiring pay for days in which no work is performed, is a far cry from the FLSA's original intent: "'A fair day's pay for a fair day's work.'" Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942).

No rationale was ever articulated by USDOL to apply its disciplinary deduction standard to public employers. Despite USDOL's efforts to keep anyone from talking about the irrationality of the disciplinary deduction standard, particularly as applied in the public sector, during the 1992 rulemaking process, some commentators had the gall to do so anyway. App. 110-111. For unspecified reasons, USDOL believed these uninvited commentators had not met an unstated burden of proof -- to show "public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers" -- and that public accountability problems could be ignored because public employers had "other options for disciplinary infractions." App. 111.

The court of appeals and respondents also argue that constitutional concerns under the Tenth Amendment and the Guarantee Clause (U.S. Const., Amend X and

Art. IV, § 4) may be dismissed because State employers have disciplinary "options" other than the prohibited suspensions. Presumably, USDOL could, with the same lack of rationality, decree that States were restricted to the "options" of reprimanding or discharging their employes. Constitutional concerns can not be so lightly dismissed. Can a government prohibit a demonstration protected by the First Amendment because the demonstrators have a printing press? Can blacks be barred from a white school because a black school also exists? Can a federal agency, under the Commerce power, require a State to surrender all means of disciplining its own employes other than reprimand and discharge? To say that "other options" exist is no answer to constitutional concerns.

2. The salary basis test, including the disciplinary deduction standard, is an "interpretation" rather than a "regulation".

Understandably, the Engineers want to view the test and standard in 29 C.F.R. § 541.118 as a "regulation" entitled to Chevron deference and not an "interpretation" governed by Skidmore analysis. If the Engineers label 29 C.F.R. § 541.118 a "regulation" a thousand times, it remains a non-regulatory agency interpretation.

"Regulations" appear in 29 C.F.R. Part 541, Subpart A. App. 75, 118-120. The test and standard are expressly characterized by USDOL, in 29 C.F.R. Part 541, Subpart B, as "Interpretations". App. 75-76; 118-120. The test describes its own contents as "interpretations". 29 C.F.R. § 541.118(6). While USDOL can issue "legislative rules" defining the meaning of the exemptions created by 29 U.S.C. § 213(a)(1), that authority is exercised only where USDOL declares it is doing so. *E.g.*, 1 Davis & Pierce, Administrative Law Treatise, § 6.3,

p. 24 (1994 ed.) citing Metropolitan School Dist. of Wayne v. Davila, 969 F.2d 485, 490 (7th Cir. 1992).

The Engineers are so intent on transforming the salary basis test into a "regulation" that they erroneously claim this Court, in Walling v. General Industries Co., 330 U.S. 545 (1947) "referr[ed] to the salary basis **test** as a regulation". Engineers' brief, p. 23; emphasis added. Walling did not refer to 29 C.F.R. § 541.118, first included in the Code of Federal Regulations two years later (App. 118-120), at all. 330 U.S. at 546-52. Instead Walling properly referred to 29 C.F.R. **§ 541.1** (*id.*), which contains the general salary requirement, as a regulation. App. 56-57. The test, by contrast, explains what payment on a salary basis means, the critical issue here, and is not part of those regulations. 29 C.F.R. § 541.118.[3]

The Engineers claim Skidmore analysis does not apply because the forms of nonregulatory USDOL interpretations involved in Skidmore were different. Engineers brief, p. 23, n.13. The Engineers ignore the court below, on the two preceding occasions it had analyzed 29 C.F.R. § 541.118, characterizing it as an agency interpretation governed by Skidmore analysis. Petition, pp. 15-16. Publication in the Federal Register or the Code of Federal Regulations do not make it a "regulation." *E.g.*, Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1070-72 (2nd Cir. 1995) (noting distinction between regulations in 29 C.F.R. Part 541, Subpart A and interpretations in 29 C.F.R. Part 541, Subpart B); Ritter v. Cecil County Office of Housing & Community Development, 33 F.3d 323, 328 (4th Cir. 1994); Headrick v. Rockwell International Corp., 24 F.3d 1272, 1281-82 (10th Cir. 1994) citing Chrysler Corp. v. Brown, 441 U.S. 281, 301-04 (1979) for distinction.

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[3]WestLaw ("541.118 or (salary /2 basis /2 test" in SCT and SCT-OLD files) discloses no decisions.

The Engineers, arguing Skidmore is outmoded and that non-regulatory interpretations are now entitled to Chevron deference, cite a concurring opinion of a single Justice in EEOC v. Arabian American Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring). Engineers brief, pp. 23, n. 14. They fail to note a majority of five Justices held to the contrary (499 U.S. at 257) and that the differing view Justice Scalia expressed confirms the majority did not accept his view (499 U.S. at 260 (Scalia, J. concurring).[4] The Engineers' reliance on Arabian American Oil is more curious since it was cited, in an FLSA decision adverse to USDOL, to refuse Chevron deference to nonregulatory USDOL interpretations and instead apply Skidmore analysis. Reich v. Parker Fire Protection Dist., 992 F.2d 1023, 1026 (10th Cir. 1993), *rehearing and rehearing en banc denied.* The Engineers also fail to cite the six-Justice majority, including Justice Scalia, in John Hancock Life Insurance v. Harris Bank, ___ U.S. ___, 114 S.Ct. 517, 529 and 531 (1993) confirming the continuing viability of the two different deference standards under Skidmore and Chevron. *See also* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157 (1991) (citing Skidmore and holding interpretative rules are not entitled to Chevron deference); Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 463, n. 12 (1989).

Professor Davis analyzes the continuing vitality of the distinction and the importance of restricting Chevron deference to "legislative rules". 1 Davis & Pierce at § 6.3. He notes the Seventh Circuit has both misapplied the distinction and, in other cases, applied the distinction through "particularly clear and well-reasoned" analysis.

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[4]The Engineers fail to note Justice Scalia's most frequently cited comment in that opinion that "deference is not abdication." Arabian American Oil, 499 U.S. at 260 (Scalia, J., concurring).

Id. at pp. 246-47. The Seventh Circuit recently gave **no** deference to a non-legislative agency interpretation. Atchison, Topeka & Santa Fe Ry. v. Pena, 44 F.3d 437, 442 (7th Cir. 1994) (*en banc*), *cert. granted*, 115 S.Ct. 2575 (1995). The appellate courts appear confused about how to treat agency interpretations which are not legislative rules. *E.g.*, cases noted in Elizabeth Blackwell Health Center for Women v. Knoll, 61 F.3d 170, 185, 192, n. 11 (3rd Cir. 1995) (Nygaard, J. dissenting).

The salary basis test is not entitled to Chevron deference but is instead governed by Skidmore analysis. Under that analysis -- requiring internal persuasiveness of reasoning -- the salary basis test, and the disciplinary deduction standard, fail miserably.

3. Applying the disciplinary deduction standard to public employers does not result from any regulation.

Applying the disciplinary deduction standard to public employers does not result from 29 C.F.R. § 541.5d or any other regulation. If the non-regulatory interpretation which is 29 C.F.R. § 541.118 and the commentary which precedes 29 C.F.R. § 541.5d in the Federal Register did not exist, there would be no provision of any sort precluding any employer from suspending their FLSA exempt workers in full day increments. 29 C.F.R. § 541.5d was limited to addressing the concern that caused it to be adopted -- whether it comported with Congressional intent for public employers to use their leave accounting systems as to exempt employes -- and the effect of the disciplinary deduction standard was simply not on USDOL's agenda at all. App. 59, 110-111.

The prior section noted that Skidmore analysis applies to 29 C.F.R. § 541.118, a non-regulatory

interpretation. Similarly commentary during a rule-making process is not a regulation and normally provides the "weakest support" for a litigant's position. Headrick, 24 F.3d at 1282. As with other USDOL rules, the commentary in the Federal Register was "added here by [USDOL] only to help clarify the meaning and application of the various promulgated rules that follow it. [Citations omitted.]" *Id.* That commentary is also governed by Skidmore analysis and not entitled to Chevron deference. *Id.*

C. The Founders assumed it was central to sovereignty that a government have the power to control its own workers through, among other means, suspensions and pay deductions.

Respondents assert it is not relevant to the republican forms of government Congress was to guarantee under U.S.Const., Art. IV, § 4 or to the States' reserved rights under the Tenth Amendment (U.S.Const., Amend X), whether a State government has the power to control their own employes through suspensions and pay deductions. The contemplation of such an assertion would have startled the Founders.

After decades of struggle to gain control over the officials who ran their colonial governments (Petition, pp. 20-23), the newly forged States assumed full exercise of the power to control their officials through suspensions and deductions from pay. In 1775, the Rhode Island Assembly "pushed the [Loyalist] executive out of the way by **suspending** him from office until, that fall, his seat was declared vacant, and the patriotic Deputy-Governor . . . installed in it." A. Nevins, The American States During and After the Revolution, 1775-1789 80 (1924); emphasis added. The new States each framed "Constitutions [which] made it clear that the civil officers

were instruments of the whole people: 'Magistrates are their trustees and servants, and at all times amenable to them', the Virginians put it." *Id.* at 165. In 1783, "[r]esolutions were passed [by New York] to penalize tax collectors for their delinquencies." E. Spaulding, New York in the Critical Period, 1783-1789 13 (1932).

Madison defined a republican form of government as one "administered by persons holding their offices during pleasure, for a limited period, or during good behavior." The Federalist, No. 39, p. 251 (Cooke ed. 1961). Madison expected the new national government, in determining the "tenure of the ministerial offices" to follow "the example" set by the States. *Id.* at p. 253.

An "example" set by the States to which Madison likely referred was the experience of his friend, Governor Thomas Jefferson, in Madison's Virginia, just a few years before the Constitutional Convention. Governor Jefferson analyzed which entity within the State, the Executive or the Assembly, "may remove officers of the line [i.e., military officers] or staff." "Notes concerning the Right of Removal from Office", 4 The Papers of Thomas Jefferson: 1 October 1780 to 24 February 1781 281-82 (J. Boyd, ed. 1951). The "question principally affects the Staff, whose rapacity, inattendance and means of evasion require energetic superintendence." *Id.* at 281. He concluded it implicated "Republican form and principles" for the State Executive to have power to remove Staff, if not military officers, and that, absent that power, the "[c]onsequences" would be grave:

> Cannot dismiss **nor suspend** the most pettifogging and rascally officer. Forage masters--waggon masters--gardeners--purveyors--nurses--expresses--waggoners--smiths--carpenters--mercantile agents--ambassadors--Directors general--surgeons--

surgeons mates--chaplains--Commissaries--Quartermasters--"

Id. at 282; emphasis added. Jefferson "became familiar with the 'rapacity, inattention and means of evasion' practised by forage masters, purveyors, &c., soon after becoming governor." *Id.* at 282, f/n.

After 1776, Maryland, to control "poor attendance" which "continued to plague the General Assembly" throughout the late 1700's, deducted daily pay from any legislator absent without excuse. C. Everstine, The General Assembly of Maryland, 1776-1850 33, 152-55 (1982). Similar to the suspensions the USDOL standard would now usurp from State authority, Maryland, before and as the Constitutional Convention was being held, made these daily pay deductions for unexcused absences to assure public business could be conducted. *Id.* at 152. *See id.* at 33, 153-54 for numerous actual deductions. This practice developed during the colonial period. C. Everstine, The General Assembly of Maryland, 1634-1776 40, 41, 60, 74, 357 (1980). *See also* J. Munroe, Colonial Delaware: A History 96 (1978).

By 1787, each government assumed the power to suspend and deduct pay as to their own public officers for unexcused absences and other violations of the public trust. *E.g.*, T. Tshudy, "Compilation of Qualifications and Charges and Punishments afforded Members of the Pennsylvania House of Representatives, 1682-1980" in Report on the History of Disciplinary Actions in the Pennsylvania House of Representatives (1980). Members were suspended by the Legislature for "not upholding the responsibilities of their position." *Id.* at 4. More than fifty legislators were fined before 1787 for unexcused absences or tardiness. *Id.* at 1-20. In 1755, unexcused absences were punished by members "forfeiting [their] whole wages during that sitting." *Id.* at 15.

Hamilton declared the importance of "promoting punctuality" in government. The Federalist, No. 75, p. 508 (Cooke ed. 1961). He also observed that "A POWER OVER A MAN'S SUBSISTENCE AMOUNTS TO A POWER OVER HIS WILL (The Federalist, No. 79, p. 531 (Cooke ed. 1961)) and that "[t]hose who pay are the masters of those who are paid" 1 M. Farrand, Debates of the Convention 373 (rev. ed 1937).

The Convention commenced with a motion for a rule to "provide agst. interruption of business by absence of members" which was adopted the following day. 1 Farrand 13, 15 and 17. The idea of penalizing public servants for unexcused absences was so central to the Founders' thinking it was expressly incorporated into the Constitution. U.S. Const., Art. I, § 5, cl. 1. "Each House" of Congress was "authorized to compel the Attendance of absent Members, in such manner, and **under such Penalties** as each House may provide." *Id.*; emphasis added. The Pinckney Plan authorized each house to "punish non attending members". 4 Farrand 40 (replacing 2 Farrand 140) and 4 Farrand 42 (replacing 2 Farrand 141). On August 10, 1787, Madison cosponsored the motion to add this provision to the Constitution. 1 Farrand 253-54. Without debate, it was "[a]greed to by all except Pena. which was divided." *Id.* The Senate's authority to "compel the attendance of its own members" was noted with approval during ratification debates in South Carolina. 3 Farrand 252. This Court, observing the penalties each house "is authorized to inflict in order to compel the attendance of absent members" may even include "imprisonment," appeared to recognize the power to decide the appropriate penalties unquestionably lay with the body itself. Kilbourn v. Thompson, 103 U.S. 168, 190 (1880), *criticized on other grds.*, Hutcheson v. United States, 369 U.S. 599, 613 (1962).

The Founders debated suspending impeached persons from their office. 2 Farrand 64-69, 612-13. In

July 1787, eight States approved and two States disapproved that proposal. 2 Farrand 69. The question arose again in the Convention's closing days with a motion that "persons impeached be suspended from their office until tried and acquitted." 2 Farrand 612. Madison opposed this proposal arguing the President was already too dependent on the Legislature, through its power to try an impeached President, and that an "intermediate suspension" would allow the Legislature to "make way for . . . another who will be more favorable to their views" by "vot[ing] a temporary removal of the existing Magistrate." 2 Farrand 612-13. This argument apparently swayed the Convention which defeated the proposal eight to three. 2 Farrand 162-13.

The Pinckney Plan called for expressly granting the President, as opposed to Congress, to "suspend Officers, civil and military." 2 Farrand 158. Instead, the authority to appoint and remove "'inferior officers'" of the national government was left divided between the Executive and the Legislature. *E.g.*, Freytag v. C.I.R., 501 U.S. 868, 883 (1991); Bowsher v. Synar, 478 U.S. 714, 729 (1986). There was never a question that, as between the federal and State governments, each had the power to discipline their own employes.

Absent personal constitutional rights, just as "no constitutional guarantee enjoys preference, so none should suffer subordination or deletion." Ullman v. United States, 350 U.S. 422, 428 (1956). Allowing Congress to police itself in not devouring the Tenth Amendment, declaring the Guarantee Clause beyond the scope of judicial review and deferring to agencies as woefully derelict as USDOL would subordinate or delete Constitutional guarantees of State powers far more effectively than direct assaults. The continuing destruction of State powers which renegade agencies, compounded by appellate court abdication, can cause -- despite political and ideological changes in the Presidency

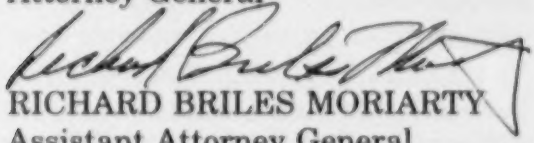
and the Congress and headline declarations about returning power to the States -- proves the Garcia hypothesis, that the political process would protect the States, is wrong. This Court is the last safeguard to protect these guarantees.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

JAMES E. DOYLE
Attorney General



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No. 95-586

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN,
et al.,

Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.,

Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

ADDITIONAL APPENDIX
REPLYING TO BRIEFS
OPPOSING PETITION FOR WRIT OF CERTIORARI

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ADDITIONAL FEDERAL REGISTER PUBLICATIONS INVOLVED

14 Fed. Reg. 7703 and 7735 (December 28, 1949) -- published by USDOL to create 29 C.F.R. § 541.118 -- states, in relevant part:

TITLE 29--LABOR

. . .

PART 541-- . . .

INTERPRETATIONS OF REGULATIONS

. . .

. . . [Revisions of the regulations were published on December 24, 1949 as 29 C.F.R. Part 541, Subpart A.] For the purpose of outlining and explaining the application of these regulations to specific types of situations, an explanatory bulletin has been prepared which interprets these regulations in the light of their application to specific factual situations. This explanatory bulletin contains statements of general policy and interpretations directly related to the regulations . . . . The text of such explanatory bulletin is as follows:

SUBPART B--INTERPRETATIONS

* * *

§ 541.118 *Salary basis.* (a) An employee will be considered to be paid on a salary basis within the meaning of the regulations in Subpart A of this part, if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the workweek or in the quality or quantity of the work performed. The employee must receive his full salary for

any week in which he performs any work without regard to the number of days or hours worked.

(b) *Minimum guarantees plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $55 or more a week and, in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of his branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations in Subpart A of this part. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that he will receive not less than the amount specified in the regulations in Subpart A of this part in any week in which he performs any work. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $100 may not arbitrarily be divided into a guaranteed minimum of $55 paid in each week in which any work is performed, and an additional $45 which is made subject to deductions.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. For this purpose, an extended voluntary leave of absence may be considered to come within this rule. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations in Subpart A of this part if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations in Subpart A of this part.

50 Fed. Reg. 47696-47997 (November 19, 1985) -- published by USDOL -- states, in relevant part:

> **SUMMARY:** The Wage and Hour Division is considering proposing revisions [to 29 C.F.R. Part 541]....Comments are invited concerning the current definitions of terms relating to the salary, duties, and responsibilities tests for [exempt] employees, as well as the interpretations of such definitions.
>
> ...
>
> Accordingly, comments are sought from interested parties concerning the

matters set forth below, as well as any other issues of interest under this regulation.

I. Salary Tests.

....Comments are sought with respect to the following matters related to the salary tests:

....

2. Should the salary tests be eliminated? If so, what tests should [USDOL] rely on to determine applicability of the 29 U.S.C. § 213(a)(1)] exemption? What would be the economic impact of the elimination of the salary tests?

....

10. Should [USDOL] recognize individual State and local government civil service systems for classifying [executive, professional and administrative] employees in applying the exemption to employees of such governments? Such recognition would not alter the traditional FLSA principle that an employer who claims an exemption under the Act has the burden of showing that it applies.

54 Fed. Reg. 44828, 44836 and 44837 (October 30, 1989) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . . The agenda includes all regulations which are expected to be under review or development between October 1989 and October 1990.

. . . [The President and Congress have required this agenda since 1981.]

* * *

1457. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
Comments Due on Suspension Proposal	04/26/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
Next Action Undetermined		

. . .

Additional Information: . . . Regulatory action will be delayed to allow the Administration sufficient time to consider these issues.

. . .

55 Fed. Reg. 16371 and 16372 (April 23, 1990) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between April 1990 and April 1991.

. . . [The President and Congress have required this agenda since 1981.]

* * *

1608. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
Comments Due on Suspension Proposal	04/26/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
Next Action Undetermined		

. . .

55 Fed. Reg. 44680 and 44689 (October 29, 1990) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between October 1990 and October 1991.

* * *

1691. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
Comments Due on Suspension Proposal	04/26/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
Next Action Undetermined		

. . .

56 Fed. Reg. 17530 and 17537 (April 22, 1991) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between April 1991 and April 1992.

. . . [The President and Congress have required this agenda since 1981.]

* * *

1842. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
Comments Due on Suspension Proposal	04/26/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From	01/17/86	51 FR 2525

01/21/86 to 03/22/86		
ANPRM Comment Period End	03/22/86	51 FR 2525
To be determined	03/00/92	

. . .

56 Fed. Reg. 53558 and 53567 (October 21, 1991) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between October 1991 and October 1992, . . .

. . . [The President and Congress have required this agenda since 1981.]

* * *

1993. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was

published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
NPRM Public Sector Overtime Liability	09/06/91	56 FR 45828
Interim Final Rule Effective Date	09/06/91	56 FR 45824
Interim Final Rule--Exception From Salary Basis Definition	09/06/91	56 FR 45824
Interim Final Rule Comment Period End	10/07/91	56 FR 45824
Next Action To Be Determined	03/00/92	

. . .

Additional Information: . . . As a result of recent developments in private litigation, the Department has determined that it is necessary to revise the regulations for exemption of public sector employees. Specifically, the Department intends to revise the regulations to provide an

exception from the requirement for payment "on a salary basis" to reflect public sector compensation practices which, in some cases, are based on statutes or regulations regarding the accountability of public employees. The Department, in its overall review of the full range of issues raised by public comments submitted on its advance notice of proposed rulemaking of November 19, 1985, continues to consider a variety of possible changes to the regulations.

. . .

57 Fed. Reg. 16952 and 16960 (April 27, 1992) -- published by USDOL as part of a Semiannual Agenda of Regulations -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between April 1992 and April 1993, . . .

. . . [The President and Congress have required this agenda since 1981.]

* * *

1628. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations

was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
Next Action Undetermined		

. . .

Additional Information: . . . The Department, in its overall review of the full range of issues raised by public comments submitted on its advance notice of proposed rulemaking of November 19, 1985, continues to consider a variety of possible changes to the regulations.

. . .

57 Fed. Reg. 51556 and 51565 (November 3, 1992) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between October 1992 and October 1993, . . .

. . . [The President and Congress have required this agenda since 1981.]

* * *

1927. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525

ANPRM 03/22/86 51 FR 2525
Comment
Period End
Next Action Undetermined

. . .

Additional Information: . . . The Department, in its overall review of the full range of issues raised by public comments submitted on its advance notice of proposed rulemaking of November 19, 1985, continues to consider a variety of possible changes to the regulations.

. . .

58 Fed. Reg. 24562 and 24569 (April 26, 1993) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between April 1993 and April 1994, . . .

. . . [The President and Congress have required this agenda since 1981.]

* * *

2024. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations

was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
ANPRM Second	O9/00/93	

. . .

Additional Information: . . . The Department, in its overall review of the full range of issues raised by public comments submitted on its advance notice of proposed rulemaking of November 19, 1985, continues to consider a variety of possible changes to the regulations.

. . .

58 Fed. Reg. 56580 and 56587 (October 25, 1993) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between October 1993 and October 1994, . . .

. . . [The President and Congress have required this agenda since 1981.]

* * *

2109. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

Significance: Regulatory Program.

. . .

Legal Deadline: None

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525

ANPRM 03/22/86 51 FR 2525
Comment Period
End
ANPRM Second 00/00/00

. . .

Additional Information: . . . The Department, in its overall review of the full range of issues raised by public comments submitted on its advance notice of proposed rulemaking of November 19, 1985, continues to consider a variety of possible changes to the regulations.

59 Fed. Reg. 20602 and 20610 (April 25, 1994) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between April 1994 and April 1995, . . .

. . . [The President and Congress have required this agenda since 1981.]

* * *

2148. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

. . .

Economically significant: Yes.

. . .

Legal Deadline: None

. . .

Abstract: . . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more

comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
ANPRM Second	00/00/00	

. . .

Additional Information: . . . The Department, in its overall review of the full range of issues raised by public comments submitted on its advance notice of proposed rulemaking of November 19, 1985, continues to consider a variety of possible changes to the regulations.

. . .

59 Fed. Reg. 57127, 57129 and 57130 (November 14, 1994) -- published by USDOL -- states, in relevant part:

. . .

1994 Regulatory Plan

. . .

. . . [This] 1994 Regulatory Plan includes 21 of the Department's most significant important regulations . . . [although] it is important to note that the Department views every regulatory effort it undertakes as important and necessary.

. . . Our goal is to develop regulations that are effective, consistent, sensible and understandable. To this end, we are committed to coordinating with other government agencies and working closely with target populations and the regulated community whenever appropriate.

. . .

[Numerous types of regulations listed including brief mention of those applicable to the FLSA exemptions.]

* * *

96. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

. . .

Legal Deadline:

None

Abstract:

. . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.] . . . [R]evisions [in 1992 to adopt 29 C.F.R.

§ 541.5d] were limited in nature and the regulations are still in need of updating and clarification. In addition, recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors. All of these factors have led the Department to conclude that a review of these regulations is both necessary and appropriate. The Department intends to solicit input through a public hearing process to identify issues and to develop regulatory proposals.

Statement of Need:

. . .

Because of the limited nature of . . . revisions [such as 29 C.F.R. § 541.5d in 1992], the regulations are still in need of updating and clarification. In addition, recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors.

Alternatives: Because the regulations are sorely out of date, a comprehensive rulemaking is necessary. The Department intends to reopen the comment period of the November 1985 advance notice of proposed rulemaking and to obtain additional information pertaining to matters that have arisen subsequently through a hearing process. Following these activities, full regulatory alternatives will be developed.

Anticipated Costs and Benefits:

Some 23 million employees are estimated to be within the scope of these regulations. Legal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without

considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. Clear and comprehensive regulations will once again provide for central, uniform control over application of these regulations and eliminate this apprehension.

In the public sector, State and local government employers contend that the rules are based on production workplace environments from the 1940s and 1950s and that they do not readily adapt to contemporary government functions. . . . Resolution of these conflicts over how the regulations are to be applied in the public sector will ensure that employees are protected, that employers are able to comply with their responsibilities under the law, and that the regulations are enforceable. . . .

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
NPRM	04/00/95	

. . .

60 Fed. Reg. 23536, 23544 and 23545 (May 8, 1995) -- published by USDOL -- states, in relevant part:

. . .

Semiannual Agenda of Regulations

. . .

The agenda lists all regulations that are expected to be under review or development between April 1995 and April 1996, . . .

* * *

2055. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

. . .

Legal Deadline: None

. . .

Abstract: . . . The [threshold weekly salary amounts required for exempt status] have not been undated since 1975. The Department has, however, made limited revisions to these regulations to address specific issues [including the adoption of 29 C.F.R. § 541.5d in 1992]. . . . Recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors. All of these factors have led the Department to conclude that a review of these regulations is both necessary and appropriate.

Statement of Need: . . . These regulations have been revised in recent years to deal with specific amendments or issues [including the adoption of 29 C.F.R. § 541.5d in 1992]. . . .

Because of the limited nature of these revisions, the regulations are still in need of updating and clarification, especially with regard to applicability to public sector employment. In addition, recent court rulings have caused confusion on what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors.

Alternatives: Because the regulations are sorely out of date, a comprehensive review is necessary. Regulatory alternatives will be developed as part of the review.

Anticipated Costs and Benefits: Some 23 million employees are within the scope of these regulations. Legal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. Clear and comprehensive regulations will once again provide for central, uniform control over application of these regulations.

. . .

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment	01/17/86	51 FR 2525

Period From
01/21/86 to
03/22/86
ANPRM 03/22/86 51 FR 2525
Comment Period
End
NPRM 10/00/95

60 Fed. Reg. 59608, 59613 and 59614 (November 28, 1995) -- published by USDOL -- states, in relevant part:

. . .

Statement of Regulatory Priorities

. . .

DOL's framework of rules undergoes continual change. . . . It must also be updated to take into account changes in the workplace. . . . In addition, the Department recognizes that a comprehensive review of the framework is periodically needed to eliminate those sections that are outdated and to reinvent those parts that are unreasonably burdensome or confusing. DOL has recently undertaken such a review in response to President Clinton's April 24, 1995, "Regulatory Reinvention Initiative." . . .

. . .

[Numerous sets of regulations listed including brief mention of those applicable to the FLSA exemptions.]

* * *

DOL-ESA
67. DEFINING AND DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)
Priority:

Economically Significant

. . .

Legal Deadline:

None

Abstract:

. . . [After closing comments on a partial review of these regulations in 1981, USDOL] concluded that a more comprehensive review of these regulations was needed and decided to reopen the comment period and broaden the scope of the review to include all aspects of the regulations. An ANPRM [App. 120-121] was published on 11/19/85 and its comment period [closed in March 1986.]

The Department has revised these regulations since the ANPRM to address specific issues [including adoption of 29 C.F.R. § 541.5d]. . . . These revisions were limited in nature and the regulations are still in need of updating and clarification. In addition, recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors. All of these factors have led the Department to conclude that a review of these regulations is both necessary and appropriate.

Statement of Need:

. . .

Because of the limited nature of these revisions [including adoption of 29 C.F.R. § 541.5d], the regulations are still in need of updating and clarification. In addition, recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors.

Alternatives:

The Department has met with affected interest groups in developing regulatory alternatives. Following completion of these outreach and consultation activities, full regulatory alternatives will be developed. Although legislative proposals have been introduced in the Congress to address certain aspects of these regulations, the Department will continue to pursue revisions to the regulations as the appropriate response to the concerns raised. Alternatives likely to be considered include particular changes to address "salary basis" and salary level issues to a comprehensive overhaul of the regulations that also addresses the duties and responsibilities tests.

Anticipated Costs and Benefits:

Some 23 million employees are estimated to be within the scope of these regulations. Legal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. Clear, comprehensive, and up-to-date regulations would provide for central, uniform control over the application of these regulations and ameliorate this apprehension. In the public sector, State and local government employers contend that the rules are based on production workplace environments from the 1940s and 1950s, and that they do not readily adapt to contemporary government functions. . . . Resolution of confusion over how the regulations are to be applied in the

public sector will ensure that employees are protected, that employers are able to comply with their responsibilities under the law, and that the regulations are enforceable.

. . .

. . .

Timetable:

Action	Date	FR Cite
Indefinite Stay of Final Rule	02/12/81	46 FR 11972
Proposal To Suspend Rule Indefinitely	03/27/81	46 FR 18998
ANPRM	11/19/85	50 FR 47696
Extension of ANPRM Comment Period From 01/21/86 to 03/22/86	01/17/86	51 FR 2525
ANPRM Comment Period End	03/22/86	51 FR 2525
NPRM	06/00/96	
NPRM Comment Period End	08/00/96	

. . .